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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 457th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 21 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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Article 11

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 11

1. The CHAIRMAN invited the Commission to take up paragraphs 1 and 2 of article 11 together, since they dealt with comparable situations. He suggested that, for the sake of consistency with the wording of paragraph 2, the words "and the beginning" in paragraph 1 should be replaced by the words "or the beginning".

2. Mr. BHALA (United States of America) pointed out that in practice in the commercial world there was an average of one revocation order for every 30 amendments made to a payment order. He therefore suggested that a reference to amendments should be inserted in paragraphs 1 and 2 of article 11.

3. Mr. GREGORY (United Kingdom) said that, in view of the comment made by the United States representative, the Model Law should in principle deal with amendments. If a reference to amendments was inserted, however, it would be necessary to state what an amendment was and what a bank did when it received one. He suggested that, rather than embarking on such a change at the present late stage, the Commission should leave the article as it was in that respect and note that the Model Law did not deal with the question of amendments to payment orders.

4. He approved the Chairman's drafting suggestion. He drew attention to his Government's proposal in its written comments (A/CN.9/347, p. 62, sect. 25) that the term "payment date" in paragraph 2 should be replaced by the term "execution date". Since the meaning of the latter term had been extended to include the beneficiary's bank, it would be appropriate to make that change.

5. The United Kingdom proposal was adopted.

6. Mr. IWAHARA (Japan) agreed with the view expressed by the representatives of the United Kingdom and the United States of America that the Model Law should not overlook the question of amendments to payment orders. Since time was short, however, it might be best to leave the matter for interpretation.

7. Mr. ADEDIRAN (Nigeria) concurred. The sender had the right to amend a payment order before it was sent. At the present juncture it would be best to allow for the exercise of that right through interpretation of the Model Law.

8. Miss BOUM (Cameroon) said that if amendments of payment orders were more numerous than revocations, the Working Group must have discussed them. She wondered why the Working Group had not catered for them in the draft Model Law.

9. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the idea that the problem should be left for interpretation. That could be taken to mean, for example, that the Model Law simply did not deal with amendments and that they were a matter for national legislation. Alternatively, the Commission might consider stating, on the lines of article 7(2) of the United Nations

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Convention on Contracts for the International Sale of Goods, that matters not expressly dealt with in the Model Law would be dealt with in conformity with the general principles on which it was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

10. Mr. BHALA (United States of America) said that, if the Commission decided not to include a reference to amendments in the Model Law, he would be satisfied if it was noted in a commentary to the instrument that the issue was important in the commercial world; and that, although it was not dealt with explicitly in the Model Law, the text contained nothing to preclude amendments being made to payment orders and might be considered to cover them.

11. The CHAIRMAN suggested that, for the time being, the Commission might proceed on the assumption that the Model Law would not refer to amendments to payment orders.

12. Mr. LE GUEN (France) observed that the Commission had rejected a proposal by the United States to insert a reference to amendments in article 2(j) (A/CN.9/SR.443, para. 22). He agreed with the view expressed on the subject by the United Kingdom representative.

13. Mr. HERZBERG (Observer for Israel), referring to paragraph 1, said that if a bank executed a payment order before the date of execution, he did not see how it could act on a revocation order, unless it was able to pass it on to an intermediate bank in the chain. It might be best if the paragraph referred simply to execution.

14. Ms. KOSKELO (Observer for Finland) suggested that it might be necessary to set a limit on amendments to payment orders. If an amendment entailed a very large increase in an order, it might cause difficulties for the bank concerned.

15. Mr. GREGORY (United Kingdom) said that the observer for Israel had raised an important point which deserved consideration. The Commission had not yet reached agreement on a definition of the term "execution date", but since article 10 now provided that execution must take place on the day an order was received or on the next day, the bank had a choice in the matter. For most purposes it would make sense if the execution date was defined as the date by which a bank was required to execute the payment order, which effectively would mean the later of the two days in question. That might, however, be unsatisfactory in the case with which article 11 was concerned. For example, a bank might execute a payment order on the day of receipt and receive a revocation order effected before the later of the actual time of execution and the beginning of the execution date; if the execution date was defined in the manner he had just described, the later of the two days would be the second day. Banks should not be discouraged from executing an order on the day of receipt where possible, but the fact that they might be required to act on a revocation order effected as late as the second day could have that result. He was therefore uncertain whether the rule in paragraphs 1 and 2 of article 11 was appropriate for the Model Law.

16. Mr. LE GUEN (France) said that he did not entirely agree with the United Kingdom representative's reasoning. There was nothing in article 11 to provide that a bank should automatically carry out a revocation order. If a bank received a revocation order before the execution date for the payment order, it would be free to decide if it had a reasonable opportunity to act or not. If a bank which had executed a payment order on the first day received a revocation order after execution, it could not reasonably be expected to execute the revocation order. He suggested that the problem might be solved simply by deleting the words "and the beginning of the execution date" at the end of paragraphs 1 and 2.

17. Mr. GREGORY (United Kingdom) said that the reason for the inclusion of the words "and the beginning of the execution date" was to ensure that a revocation order received before the beginning of the execution date was properly effected. Otherwise a bank could claim that it had not had a reasonable opportunity to act because it had already executed the payment order.

18. Mr. ADEDIRAN (Nigeria) agreed with the representative of France. The problem with revocation was that once a payment order had been executed in fact, it could not be revoked. If the payment order had been executed on the day it was received or the following day, the revocation order would not be valid. It would be better to provide simply that the revocation would not be valid after the actual time of execution.

19. Mr. GREGORY (United Kingdom) said he felt sure that the idea which the Commission wished to express was that the bank must have a reasonable opportunity to act before the later of the actual time of execution of the payment order and the earliest date on which it was required to execute it under article 10. That might be the day of receipt or, if the circumstances in subparagraphs (a) and (b) of article 10(1) applied, a later date.

20. Mr. HUANG Yangxin (China) said that there was a close link between paragraphs 1 and 2 of article 11 and paragraph 5 of the article. The reason for the mention of the actual time of execution and the beginning of the execution date was that they applied mainly to a fixed date for execution as stipulated in the payment order. Under paragraph 5, if a receiving bank executed a payment order before the stipulated payment date and then received a revocation order, it would not be entitled to reimbursement; even if it had made the payment before the execution date, it would still have to execute the payment order. It might therefore be advisable to consider wording which would allow the receiving bank to execute a payment order early, without a stipulated execution date; in other words, the actual time of execution mentioned in paragraphs 1 and 2 would apply only to payment orders which specified a future date of execution.

21. Mr. LOJENDIO OSBORNE (Spain) said that the French representative had proposed the deletion from article 11 of the reference to execution date. A receiving bank late in executing a payment order was liable under article 16; if there was a revocation order in those circumstances, his understanding was that acceptance of the French proposal - leaving only the notion of effective execution in article 11 - would mean that consequences would arise under article 11(5).

22. Mr. CRAWFORD (Canada) considered that the French suggestion would upset the balance of article 11. The existing text defended both the interests of the sender, in guarding against premature execution, and the right of the receiving bank to have a reasonable opportunity to take action.

23. In response to a suggestion by the Chairman, the Commission agreed to maintain the balanced approach to revocation orders which was expressed in the existing text of paragraphs 1 and 2 of article 11.

24. The CHAIRMAN called for comments on the use of the term "execution date" in article 11.

25. Mr. SCHNEIDER (Germany) considered that the term "execution date" meant the time when an obligation fell due, but that in construing it a distinction should be drawn between that time and the time when it was fulfilled. He therefore proposed the replacement of the words "execution date" by the words "time when a bank may execute".

26. The CHAIRMAN said that in his view the German suggestion was inconsistent with the decision which the Commission had just taken.

27. Mr. GREGORY (United Kingdom) thought that might not be the case. Acceptance of the German suggestion would exclude premature execution. It would mean that the latter part of article 11(1) would indicate that the receiving bank should have a reasonable opportunity to act before the later of the actual time of execution and the earliest date when it was permitted to execute under article 10. If the receiving bank had not executed the payment order when the revocation order arrived, the point raised by Spain would be taken care of. If it had executed the payment order, the revocation would not be applicable. If the payment order specified a later payment date, the bank would not have been allowed to execute the payment order on the day of receipt but would have been obliged to execute it on the date specified. The solution seemed perfectly satisfactory.

28. Ms. KOSKELO (Observer for Finland) suggested that it might be clearer to use the words "the later of the actual time of execution and the day on which the payment order should have been executed under article 10(1)(a) or (b)".

29. Mr. HUANG Yangxin (China) suggested that the paragraph might refer to the period between the time when the receiving bank was entitled to execute the payment order and the day on which it was obliged to execute it.

30. Mr. DE BOER (Netherlands) said he believed that banks were always permitted to execute payment orders early if no execution date was specified.

31. Mr. BHALA (United States of America) said that the question being discussed was extremely technical and consequently it was often difficult to understand the implications of every proposal. He believed that the original text catered in a perfectly satisfactory manner for the point under discussion. To illustrate that, he had worked out a hypothetical case involving a four-day period: on day one the receiving bank received a payment order with an indication that day four should be the execution date. On day two the receiving bank executed the order - prematurely. On day three the

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sender sent a revocation order, day four still being the execution date. With the present wording of article 11, the revocation order would be effective. Under article 10(1) as redrafted by the Commission, a receiving bank was required to execute a payment order on the day on which it received it or, at the latest, on the following day. The hypothesis he had described would be valid with article 10(1) so worded.

32. Mr. GREGORY (United Kingdom) said that he was not sure whether the final point made by the previous speaker was correct. His delegation's problem was with the term "execution date", which seemed inadequate for the situation in which an order was received by a bank which wished to execute it on the same day. If it did so and a revocation order arrived on the second day, it was not clear to him if the beginning of the execution date would be the first day or the second. If the term "execution date" meant "date by which execution must take place", which would seem sensible, the time concerned would be the end, not the beginning, of the period.

33. Mr. SCHNEIDER (Germany) said that he wished the text to embody the idea that a bank was permitted, but not obligated, to execute the payment order during a given period.

34. Mr. YIN Tieou (China) proposed that the text of paragraphs 1 and 2 of article 11 should remain as they were. If no execution date was specified in the payment order, that date should be the date of receipt of the payment order or the following day. Either was legally acceptable.

35. The CHAIRMAN recalled the Commission's decision, in regard to article 10(1), that the day on which a payment order should be executed was the day of its receipt or the following business day. In principle, execution should take place on the same day, not the "first" or the "second day"; it would, he believed, weaken that principle if reference was made to the first or the second day of execution in article 11.

36. Mr. GREGORY (United Kingdom) said that the matter under discussion involved the whole concept of execution and had implications for provisions of the text other than article 11. He regretted that he could not agree with the Chairman's view.

37. Mr. CONOBOY (United Kingdom) said that, if a bank saw any possibility that it might receive a revocation order after it would normally have executed the payment order, it would delay execution; consequently, as his delegation had indicated earlier in the meeting, acceptance of the rule in paragraphs 1 and 2 of article 11 would create a bias towards later execution. If a bank executed a payment order on the day of receipt, and a revocation order was received on the following day, the revocation order would be ineffective.

38. Mr. CRAWFORD (Canada) said that, in considering the meaning of the term "execution date", the Commission must take into account the need to adhere to the principle of same-day execution. He hoped that the comments by the United Kingdom delegation did not imply that premature execution should be encouraged.

39. Mr. LE GUEN (France) said that there was a substantial difference between the English and French versions of article 11(1). He considered the French version more satisfactory.

40. Mr. SOLIMAN (Observer for Egypt) said that the French version seemed to be much clearer than the English version, in the light of the Arabic version.

41. The CHAIRMAN invited the Commission to consider the following amendment to article 11(1): to replace the words "before the later of the actual time of execution and the beginning of the execution date" by the words "before the actual time of execution or the beginning of the day on which the payment order ought to have been executed under article 10(1)(a) or (b), if later". Unless he heard any objection, he would take it that the Commission accepted his suggestion and referred article 11(1) to the Drafting Group as reproduced in document A/CN.9/344, with that change.

42. It was so decided.

43. Mr. HEINRICH (Bank for International Settlements) said that the Commission might have overlooked one question relating to article 11, namely the principle, accepted by the Working Group and mentioned in the Secretariat's commentary (A/CN.9/346, p. 64, para. 2), that a payment order was irrevocable. The Model Law should therefore limit the possibility of revocation and make clear what the time-limit was for revocation. One possibility mentioned by a central bank that had submitted comments to the Bank for International Settlements was to state that revocation would no longer be possible after the account of the originator had been debited.

44. Mr. ABASCAL ZAMORA (Mexico), reverting to the question of amendments to payment orders, said that UNCITRAL had a reputation for formulating viable legal instruments. His delegation believed that the Model Law would not fall into that category if it failed to refer to amendments to payment orders. The Commission might analyse the subject - which the Working Group had not done to any great extent - and seek a suitable course of action; if it decided that the Model Law would not deal with amendments, that should be stated explicitly and it should be made clear that such matters should be left to national legislation. It might, as he had suggested earlier in the meeting, formulate a provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention). It would be regrettable, and bad law, if the Model Law remained silent on the question of amendments. If that proved to be the decision of the Commission, his Government wished that view to be reflected in the Commission's report.

45. Mr. BURMAN (United States of America) said that he associated himself with the views expressed by the representative of Mexico. In the real world of banking, amendments to payment orders were far more common than revocations. Most of the fundamental matters related to credit transfers were addressed in the Model Law, so there was no reason to exclude amendments.

46. Mr. GREGORY (United Kingdom) agreed that a general provision on interpretation similar to article 7(2) of the Vienna Sales Convention would be

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a good way of dealing with the matter. It should be included in article 18 or a later article. He did not, however, see any need to include a specific reference to amendments in article 11, since the general provision would encompass amendments. The fact that a matter was not explicitly addressed in the Model Law did not mean that it was excluded from its operation; on the principle embodied in article 7(2) of the Vienna Sales Convention, the Model Law would apply to all matters related to credit transfers. Such matters clearly included amendments to payment orders. That could, perhaps, be explained in the report of the Commission.

47. Mr. RENGER (Germany) said the question of amendments to payment orders deserved full discussion. The Commission must first decide whether or not the Model Law should explicitly address the matter and, if not, whether it was necessary to include in the Model Law a general rule similar to article 7(2) of the Vienna Sales Convention.

48. Mr. POTYKA (Observer for Austria) agreed that the matter was important and deserved careful consideration, even if the final decision was to leave the Model Law silent in respect of amendments to payment orders.

49. Mr. KAKOLECKI (Observer for Poland) endorsed the views expressed by the representative of Mexico. He was also impressed by the point made by the representative of the United States of America about the greater frequency of amendments. Why should the Model Law deal only with the less frequent occurrence, revocation?

50. Mr. ADEDIRAN (Nigeria) wondered if the Commission was trying to introduce too much detail into the Model Law. Amendments to payment orders were a practical problem between sender and receiving bank. He saw nothing against permitting amendments if they were reasonable and within the power of the receiving bank to implement. He could accept a provision to that effect if it was felt necessary.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that a provision similar to article 7(2) of the Vienna Sales Convention would be a useful way of meeting the concerns of the representative of Mexico, as the representative of the United Kingdom had demonstrated.

52. Mr. CRAWFORD (Canada) said that, to put matters in perspective, while amendments might be more common than revocations, payment orders as such were vastly more frequent than amendments. The inclusion of a general provision similar to article 7(2) of the Vienna Sales Convention was a good suggestion, but he would prefer the Model Law to indicate explicitly that amendments would be treated in the same way as revocations.

53. Mr. PELICHET (Hague Conference on Private International Law) warned the Commission of the risk implicit in transposing a provision such as article 7(2) of the Vienna Sales Convention from a convention to a model law, since the circumstances envisaged in the two kinds of instrument were not the same.

54. Mr. FUJISHITA (Japan) said he preferred that the Model Law should remain silent on the matter. Perhaps later a general provision on interpretation might be inserted.

55. Mr. HEINRICH (Bank for International Settlements) said that an amendment could be viewed as a revocation of a payment order and the creation of a new one.

56. Mr. BOSSA (Observer for Uganda) supported the explicit reference suggested by the representative of Canada.

57. Mrs. PETRE (Society for Worldwide Interbank Financial Telecommunications) said that the practice in her organization, SWIFT, was to treat amendments as both a revocation and a new payment order.

The meeting rose at 12.45 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 458th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 21 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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Article 11 (continued)

Article 13

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The meeting was called to order at 2.25 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 11 (continued)

1. The CHAIRMAN said that there had been general agreement in the Commission that there should be a specific reference to amendments in the Model Law. Consequently, he suggested that the following new paragraph be added to article 11, subject to any editorial changes by the Drafting Group: "The principles contained in this article will apply to the amendment of a payment order."

2. Following an indicative show of hands, he noted that most members of the Commission were in favour of the text.

3. Mr. VASSEUR (Banking Federation of the European Community) said he endorsed the Chairman's approach to the problem but wondered if the text would cover all the possible kinds of amendments, not all of which would necessarily take the form of a revocation.

4. For instance, in the case of an originator who wished to increase the amount of a payment order, no revocation would be needed. If, however, he desired to decrease the amendment, the earlier payment order would have to be revoked.

5. The CHAIRMAN said he thought that the proposal would cover all interpretations.

6. Mr. ABASCAL ZAMORA (Mexico) requested that, time permitting, the Commission should consider the adoption of a general rule on interpretation.

7. The CHAIRMAN agreed to that request.

8. He drew attention to the Secretariat's comments on paragraph 3 of article 11 (A/CN.9/346, pp. 65-66) which implied that the paragraph might be redundant. However, the Working Group had considered it useful to retain it and there appeared to be no objection in the Commission to its retention.

9. Inviting the Commission's attention to article 11(4), he recalled that it had decided to make an exception to the authentication rule in article 4(2), (3) and (4) and an amendment to the revocation of payment order provision in article 4(1). It had added the same reference to the revocation order in article 4(4). Since the reference to authentication had already been made, he wondered whether article 11(4) was still needed.

10. Mr. CONOBOY (United Kingdom) said that it had hitherto been considered that the provision in paragraph 4 was a useful one. It was important to remember that there was no provision in the Model Law for a bank to reject a revocation order, whereas, if it had doubts about the authenticity of a

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payment order, it could always reject it. There was thus some merit in retaining the provision.

11. The CHAIRMAN said he wondered whether, if a payment order had been authenticated, a revocation order would have to be authenticated in the same manner.

12. Mr. CONOBOY (United Kingdom) said that, since the Working Group had not wished to insist that the method of authentication should necessarily be the same, paragraph 4 did not prescribe any rule for authentication.

13. Mr. BURMAN (United States of America) said he thought that paragraph 4 should be deleted. However, if the United Kingdom proposal were being considered, his delegation would have to propose an amendment providing that a revocation order must be authenticated if the payment order to which it attached had also to be authenticated. It would be an extraordinary restriction on commercial practice to require that all revocation orders be authenticated when article 4 did not provide that all payment orders had to be authenticated.

14. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in view of the important consequences of revoking a transfer, his delegation preferred to retain paragraph 4 as it stood.

15. The CHAIRMAN inquired whether the retention of article 11(4) would be compatible with the change made to article 4.

16. Mr. ABASCAL ZAMORA (Mexico) replied that there was a slight difference in interpretation. He endorsed the view of the United Kingdom representative.

17. He drew the attention of the Drafting Group to a translation error in the Spanish version of article 11(4), which referred to a payment order instead of a revocation order.

18. Mr. GREGORY (United Kingdom) said it was unclear to him why the changes to article 4 made article 11(4) unnecessary.

19. The CHAIRMAN replied that, on the assumption that the same method had to be used for the revocation as for the payment order, article 11(4) was inconsistent with article 4, since authentication was not required for the payment order. However, if the same method was not required, the paragraph could stand.

20. Mr. POTYKA (Observer for Austria) said that he thought the Commission had decided that a handwritten signature would not be considered to be an authentication. He asked whether, if an ordinary customer had signed a payment order and then wished to revoke it, he could do so by sending in a signed order of revocation, even if article 11(4) was retained.

21. The CHAIRMAN, having answered the observer for Austria in the affirmative, asked how many members of the Commission were opposed to the retention of paragraph 4.

22. Mr. BURMAN (United States of America) said that, if the paragraph was amended to make it more flexible, his delegation would be able to accept it, but it still preferred to delete it.

23. Mr. LE GUEN (France) endorsed the United States position that the paragraph should either be deleted or amended to make it more flexible. In that connection, he drew attention to the French Government proposal (A/C.9/347/Add.1, p. 4) that article 11(4) should be redrafted to read: "When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

24. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representatives of the United Kingdom, United States and France. He suggested that the Drafting Group be asked to revise the paragraph to take account of the fact that a revocation order need not necessarily be authenticated in the same way as a payment order.

25. Mr. HUANG Yangxin (China) said that there was a contradiction in that the Model Law did not provide that the payment order must be authenticated. He suggested wording on the following lines: "A revocation order which occurs after a payment order has been authenticated must also be authenticated". If a payment order did not have to be authenticated, a later revocation should not have to be authenticated either.

26. Mr. ABASCAL ZAMORA (Mexico) said that it was necessary to state that the revocation must be authenticated or authorized, to reflect the view of the Working Group that more flexibility with regard to revocation was needed.

27. The CHAIRMAN said that he took it that the members of the Commission agreed that paragraph 4 should be retained and that the Drafting Group should be requested to clarify it, if necessary, on the lines proposed by the French delegation.

28. It was so agreed.

29. The CHAIRMAN, inviting the Commission to consider article 11(5) and (6), recalled that it had been proposed that paragraphs 5 and 6 should be combined. He suggested that the Drafting Group should be entrusted with the task of preparing an appropriate combined text. If he heard no objection, he would take it that the Commission wished to approve paragraphs 5 and 6 on that understanding.

30. It was so decided.

31. Mr. GREGORY (United Kingdom) said that his Government's proposal for a new paragraph to follow paragraph 6 (A/CN.9/347, p. 61) was also related to article 13, since both article 11 and article 13 dealt with a situation in

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which there would be a refund either because the payment order or credit transfer had been revoked or because the money-back guarantee had been invoked under article 13.

32. In both articles, the refund was passed backwards along the same chain as the original credit transfer in the forward direction, resulting in the fact that the banks involved in the forward direction were also involved one by one in the opposite direction. His delegation believed that it was unduly restrictive to insist that the refund had to be made in that manner. There might well be circumstances in which a refund could be provided directly to the originator and the Model Law should permit a different route in the backward direction.

33. There might be good reasons why the backward transaction should not take place in the same manner as the forward transaction if, for example, one of the banks became insolvent. Under articles 11 and 13 as currently drafted, if such an incident occurred, the operation of the chain was such that the bank downstream from the insolvent intermediary would have no choice but to pass on the refund to the insolvent bank. That clearly would not be in the interest of the originator, who wished to recover his money.

34. During the Working Group's discussion of the question, one objection to a provision whereby an insolvent bank could be skipped had been that it could interfere with netting arrangements in which the banks involved in the chain were operating. He wished to make it clear that his delegation's proposal would not disturb any netting arrangements and he drew attention to the fact that it began with the words "Without prejudice to obligations under any agreement that nets obligations bilaterally or multilaterally ...".

35. Mr. SCHNEIDER (Germany) said he fully supported the United Kingdom proposal. He recalled the view expressed in the Working Group that all the various types of banking procedures should be covered.

36. Mr. BURMAN (United States of America) said that while his delegation understood the good intentions of the United Kingdom's proposal, it found it unacceptable. It was not realistic to use the expression "without prejudice to" netting systems, while behaving as if they did not exist.

37. In banking transactions that made use of funds transfer systems and engaged in multilateral or bilateral netting, the rights of the parties might change. The United Kingdom approach would not ensure the protection of the rights of the parties, who might in various ways have acquired obligations under a netting system. It should not be forgotten that insolvency provisions were dealt with under very separate legal regimes.

38. Mr. CONOBOY (United Kingdom) said that it was not his delegation's intention to alter insolvency law and he did not believe that its proposal did so. In the real world, one of the banks in the chain might well provide a refund to the originator by simply sending a cheque through the post, thereby avoiding the refund chain of a particular forward transaction.

39. Mr. GREGORY (United Kingdom) said it was true that the existence of netting systems could not be ignored. Under his delegation's proposal, however, a bank was not required to take advantage of the rule in question. In that connection, he drew attention to the statement in the proposal that the bank "is discharged from that obligation to the extent that it makes the refund direct to a prior sender".

40. Not all payments were made through a netting system, and a bank that was properly advised would be able to determine whether there was any risk of a conflict with a netting system. In short, it could take advantage of the rule in circumstances when it deemed it appropriate to do so.

41. Mr. BURMAN (United States of America) said that the United Kingdom proposal would authorize the skipping over of what might be prior and structural arrangements with possible legal implications. In his opinion, a Model Law that authorized a "skip" would not find easy acceptance in the commercial banking world.

42. Mr. DE BOER (Netherlands) suggested that the United States objection to the United Kingdom proposal might be met by amending the beginning of the text to read "Without prejudice to any agreement that nets obligations bilaterally or multilaterally ...".

43. Mr. SCHNEIDER (Germany) said that the Commission was dealing not with insolvency law but rather with substantive law. In his delegation's opinion, it was essential that the funds should be returned to the originator. The point of departure in the Commission had always been that, as a general rule, the idea of netting schemes should be excluded when stating that the originator had a direct claim.

44. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal. While it was true that the Commission was trying to avoid interfering in domestic insolvency law, it was inevitable that the results of its work could have an indirect effect on such laws, which would look to the Model Law to ascertain if money was owed to the insolvent bank.

45. He had some difficulty with the opening words "Without prejudice to its obligations", as he thought that rights should, perhaps, be included as well. The alternative was to make no reference at all to netting agreements which, he agreed, were largely irrelevant. Although money being refunded was thought of as money going back into the system, the fact was that any transaction that had been netted and settled was finished. The refund was a new payment. Most schemes settled daily, so that there was little danger of refunding an unsettled payment.

46. As for the United Kingdom representative's suggestion that a bank might send a cheque to the originator, he was not sure that the words "prior sender" in the proposed text would permit that.

47. Mr. BURMAN (United States of America) said he wished to make sure that his delegation's views on that fundamental and significant topic were clearly understood. The Working Group had discussed and rejected a similar proposal

(Mr. Burman, United States of America)

on the grounds that it was disruptive, so some very strong reason would be required for that decision to be reversed.

48. He was not arguing the merits of the netting system, but endeavouring to contribute to a Model Law which would not be ignored by people using high-volume netting systems. Where there was a "skip rule", there could not be netting and that would mean that the Commission would be cutting itself off from contemporary developments in banking. If such a decision were taken, then his delegation would ask for its views to be inserted as a statement in the final report.

49. Mr. BERGSTEN (Secretary of the Commission) recalled the discussions on somewhat similar lines which had taken place in the Working Group when a similar proposal, referred to as the "skip rule", had been studied. The arguments for fairness were manifest: if a refund had to go back to an insolvent bank, which was responsible for passing it on down the line, that was clearly a serious matter. On that occasion also, the United States delegation had expressed concern about netting arrangements.

50. He had studied the literature relating to article 4A of the Uniform Commercial Code and knew that a proposal on similar lines had been analysed by the Federal Reserve Bank in the United States in the context of CHIPS. In the context of netting through CHIPS, the proposals had not worked. It had been obvious that the matter would be raised again, and it was to be hoped that the United States delegation would make available not just its conclusions, but its background experience, such as the Federal Reserve Bank studies he had mentioned.

51. The Working Group had been well aware of the problems in the case of intercurrency transactions, where netting arrangements might well be in the middle, and it had rejected the proposal.

52. Mr. HEINRICH (Observer, Bank for International Settlements (BIS)) said that, at various meetings of the Commission and the Working Group, BIS had raised a number of matters of concern in regard to netting schemes and its preference that there should be no reference at all to such schemes in the Model Law. The term "netting scheme" was far too vague, the variations in operation from country to country were too great and, for the concept to have any relevance at all, distinctly more than a simple reference would be needed.

53. Mr. GREGORY (United Kingdom) said that he had found the Secretary's intervention very helpful. The discussion taking place in the Commission at the moment did not in fact appear to him to be a replica of that previously held in the Working Group. In the Working Group, the United States delegation had taken the same stand as it was currently doing in the Commission. His own delegation's response at that time had been to hold back, feeling it to be inappropriate to introduce a rule which would not be implemented in the United States.

(Mr. Gregory, United Kingdom)

54. When, at a later stage, it had had an opportunity to study the material supplied by the United States delegation and to consider it in the light of the way banks operated in the United Kingdom, his delegation had come to the conclusion that its proposal was a feasible one.

55. If it would reassure those delegations which thought that the opening words of his Government's proposal were too narrow, they could be revised to read "Without prejudice to any rights and obligations".

56. Mr. SCHNEIDER (Germany) said that the merit of the United Kingdom proposal - which his delegation supported - was the option it offered to a refunding bank to give money back direct to the originator, instead of paying it to the receiver of an insolvent bank. In theory, the originator could work fast to obtain an injunction to stop payment to the insolvent intermediary bank, but he would probably not be quick enough in practice and even then the injunction would confer no legal right to his money.

57. Mr. CRAWFORD (Canada) said that the suggestion that there should be no reference to netting seemed a sensible one. However, if CHIPS could still not function within the Model Law, even without such a reference, that would also make it difficult for him to support the proposal.

58. Mr. CONOBOY (United Kingdom), replying to a question by the CHAIRMAN, said that, if his Government's proposal were rejected, a bank which chose to make refunds under article 11 or 13 in any way other than through the chain would presumably have to rely on the contract-out provision.

59. Following an indicative show of hands, the CHAIRMAN concluded that, while more delegations were in favour of the United Kingdom proposal than opposed to it, a large number of members had not declared themselves either way. He asked the delegations of the United Kingdom and the United States to discuss the issue between themselves in an effort to arrive at a compromise. Failing such a compromise, the United Kingdom proposal would be adopted.

Article 13

60. The CHAIRMAN recalled that many delegations appeared to feel that a scheme of absolute liability was excessively harsh. That was particularly true of the first sentence of paragraph 2, although even the rest of that paragraph was widely thought to be too harsh. In fact, some delegations would be unable to accept the paragraph as a matter of fundamental principle, if no exceptions were provided.

61. Mr. SCHNEIDER (Germany) said he was glad to find that the Commission was prepared to discuss the matter. While he would support all efforts to find a compromise, his delegation had its own proposal to make.

(Mr. Schneider, Germany)

62. The procedure his delegation would prefer involved focusing on the money-back guarantee in its legal environment. It was most important to understand the whole environment in relation to banking supervisory law, to deposit protection schemes and to competition between banks. If the Commission would first study the matter in that way, his delegation would then explain its own proposal.

63. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a letter he had received from the Secretary of the Basle Committee on Banking Supervision (A/CN.9/347/Add.1, pp. 24-25), which was highly pertinent to its consideration of article 13.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation was far from happy with the principle affirmed in paragraph 1, which it regarded as much too strict and too rigid. The notion of a money-back guarantee was itself open to question.

65. Mr. HEINRICH (Observer, Bank for International Settlements) said that it was his impression from the letter referred to by the Secretary of the Commission that the Basle Committee on Banking Supervision neither approved nor disapproved of the concept of a money-back guarantee.

66. Mr. ABASCAL ZAMORA (Mexico) said that, in the Working Group, it had proved impossible to agree on any exceptions. He would not, in principle, oppose any suggestions in that regard but thought it unlikely that agreement could be reached on possible exceptions. For that reason he was in favour of retaining the article as currently drafted.

67. Mr. SCHNEIDER (Germany) said that the first sentence of paragraph 2 could be retained if provision was made for exceptions.

68. The CHAIRMAN suggested that the first sentence of paragraph 2 might be amended to read "The provisions of paragraph 1 may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the execution of that payment order."

69. Mr. VASSEUR (Banking Federation of the European Community) said that he could go along with the wording proposed by the Chairman on the understanding that, if there was a high level of risk, the originator and his bank had the right to reach an agreement whereby the originator would bear the risk.

The meeting rose at 5.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 459th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 24 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 13 (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 13 (continued)

1. The CHAIRMAN reminded the Commission that at the previous meeting it had begun considering the basic approach of article 13 to the question of the money-back guarantee. He felt that his suggestion that the first sentence of article 13(2) should provide for an exception to the general rule was useful in meeting the criticism expressed by the observer for the Banking Federation of the European Community to the rigid nature of the rule as presently worded.

2. Mr. SCHNEIDER (Germany) said he had three problems with the article. Firstly, he was concerned at its implications for the insolvency of a bank in the credit transfer chain. Secondly, he was afraid that if credit transfers were perceived to be a high-risk procedure, banks would advise their customers to use cheques instead in order to escape the money-back guarantee liability. That would negate the purpose of the Model Law, which was to encourage international credit transfers. Finally, he thought that the Model Law should be consistent with company and labour law. He could envisage a situation in which an employee of a bank might be liable to reimburse to his employer the amount of a payment order he had accepted, or in which a director might be held to be in breach of his duty of care. The element of discretion contained in the Chairman's suggestion should therefore be incorporated into the article.

3. His delegation believed in the principle of freedom of contract. The mandatory rule in article 13(2) should contain a proviso which allowed the customer some possibility of choice in the matter. Banks should be permitted to offer two credit transfer services, one with and one without a money-back guarantee. Since the money-back guarantee involved risk to the bank, it could charge for that risk. The customer could choose whether or not to pay for the money-back guarantee. Accordingly, on the assumption that the first sentence of paragraph 2 of article 13 would read as suggested by the Chairman at the previous meeting (A/CN.9/SR.458, para. 68), he proposed the insertion after that sentence of a provision reading along the following lines: "They may also be varied if the receiving bank has offered to the originator to accept payment orders including the duty to refund as laid down in article 13, paragraph (1)."

4. Another concern of his delegation was the relationship between the article and deposit insurance schemes, which were national rather than international in their operation and related only to non-bank claims. Under article 13(1), since the originator would have no direct claim to funds from an intermediary bank, in the event of the latter's insolvency those funds would not be insured under the applicable deposit insurance scheme. To address the situation where either one or more intermediary banks were insolvent, he suggested the addition, after the last sentence of article 13(1), of words expressing the idea that the originator was entitled to the return of any funds which were in the hands of an intermediary bank. That would allow him a direct claim against an intermediary bank.

5. Mr. FELSENFELD (United States of America) said he welcomed the original and constructive suggestion made by the Chairman. He was also sympathetic to the need for freedom of contract reflected in the first proposal made by the representative of Germany. His delegation had problems with both suggestions, however, because of the new ideas they contained. Banks might oppose the idea of a money-back guarantee as a continuing risk, while customers, whether corporate entities or individuals, might regard it as limiting their entitlement to damages. He therefore felt that the two suggestions needed full discussion not only by the Commission but by the parties affected.

6. Mr. CRAWFORD (Canada) said banks in his country had no objection to the money-back guarantee, since they already faced such a situation under article 4A of the Uniform Commercial Code of the United States. His delegation's problem was that the suggested provisos would allow banks to evade liability. In the case of the German proviso, banks could price the money-back guarantee option at such a level that the originator would be discouraged from using that option. In the case of the Chairman's suggestion, receiving banks might, as a matter of routine, stipulate a clause negating the money-back guarantee in favour of the originating bank in circumstances where a prudent organization might have declined to accept the payment order. That would throw the onus on to the originator to demonstrate, in the courts, that exceptional circumstances did not apply. Both provisos might thus have the effect of frustrating the intention of the Model Law.

7. The Model Law was intended to encourage trust in the banking system. That being so, there was no need for it to provide for a money-back guarantee to an originator which was a bank, since banks formed part of the system. Statistics showed that the number of payments made vastly exceeded the number of underlying commercial transactions, so the incidence of the money-back guarantee would be greatly reduced.

8. Mr. ABASCAL ZAMORA (Mexico) preferred the text prepared by the Working Group. Introducing a reference to a prudent bank would create uncertainty in interpretation. It was important to take account of the need to protect the customer. It was the customer who would have to take action for the return of his money, in some cases against an intermediary bank which he did not know and with which he had no relationship. The addition of the sentence suggested by the Secretariat in its comments (A/CN.9/346, p. 75, para. 22) deserved consideration.

9. Mr. JANSSON (Observer for Sweden) said that in his country banks operated the money-back guarantee and in business circles it was regarded as an integral part of the Model Law. He agreed with the representative of Canada about the negative effects which might arise from putting a price on the money-back guarantee. Accordingly, he could not support the first proposal made by the representative of Germany.

10. The exception suggested by the Chairman would be acceptable to his delegation, provided that it was worded in such a way as to make it very clear that the money-back guarantee would cease to apply only in exceptional individual circumstances.

11. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that article 13 as drafted by the Working Group presupposed that the originator's bank would pay the originator in any event in which the transfer was not effected - even if the intermediary bank could not pay. It seemed, however, that the originator's bank would not be so obligated in the event of the bankruptcy of the intermediary bank. The proposal of the representative of Germany on that subject therefore deserved consideration.

12. Mr. GRIFFITH (Observer for Australia) endorsed the comments made by the observer for Sweden about the Chairman's suggestion.

13. Mr. LOJENDIO OSBORNE (Spain) said that the exception contained in the second sentence of article 13(2) should be extended to include the case where the originator specified an intermediary bank. In doing so, the originator assumed a risk and in that case the receiving bank should not be liable to him for the consequences. The effect would be to reduce the money-back guarantee.

14. Mr. IWAHARA (Japan) said that he could accept the proviso suggested by the Chairman if it was modified to reflect the comment made by the observer for Sweden. Basically the money-back guarantee should be mandatory and ought to be a matter of policy in any international payments system, but certain exceptions to the obligation should be permissible. For example, should an originator wish very strongly to make a high-risk international credit transfer, the originator's bank should be entitled to contract out of its duty to refund rather than have to refuse the payment order on the ground of its potential liability.

15. Ms. KOSKELO (Observer for Finland) submitted that duty to refund would be an important confidence-building element in any viable international credit transfer system, especially where originators who were not banks were concerned. She shared the doubts voiced by the representative of Canada regarding the German proviso: there was a serious risk that the variant which included the money-back guarantee would be priced prohibitively. She could accept the exception suggested by the Chairman, the advantage of which would be that the customer would truly understand what choice he was being offered and appreciate the circumstances under which it would be permissible for a bank to deviate from its duty to refund. It should, however, be rendered explicit in the text that for those circumstances to pertain, there must be an unusual and significant risk involved in the credit transfer, by which she meant at any stage of that process, and not just at the outset.

16. Ms. JAMETTI GREINER (Observer for Switzerland) said that her Government had expressed very serious reservations about the duty to refund in its written comments (A/CN.9/347, p. 52). Those reservations persisted, albeit in a somewhat attenuated form as a consequence of the Chairman's suggestion. The notion of a money-back guarantee was not compatible with all banking systems. For what was, at best, to be only a Model Law, all chances of securing reciprocity must be exploited to the full, and for that reason she inclined towards acceptance of the German proviso, which took account of differences in banking systems and allowed for a certain flexibility in the rule without affecting its primary goal; it seemed to her to constitute a wise compromise, opening the way for the customer to make an informed choice.

17. Mr. GREGORY (United Kingdom) submitted that the money-back guarantee constituted an important part of a bargain whereby the provisions of the Model Law, while catering in large measure for banking interests and concerns, were also expected to reflect what might appositely be termed the other side of the coin. All questions of liability set aside, it was integral to the structure of the draft that if interest were to go to the beneficiary upon completion of the credit transfer, then the subject-matter of the transfer should be returned to the originator in case of non-completion.

18. Nevertheless, the serious concerns voiced about the duty to refund, in particular by the representative of Germany and the observer for Switzerland, must be addressed squarely. The United Kingdom delegation would be reluctant to see the money-back guarantee weakened in the absence of adequate safeguards; the appropriate course might be to accept the proviso suggested by the Chairman, modified to take account of the remarks made by the observer for Finland. The suggestion contained in the Secretariat's commentary on article 13 (A/CN.9/346, p. 75, para. 22) might also be indirectly of assistance in ensuring that banks would not systematically contract out of their duty to refund. He believed that only the originator and the originator's bank should be permitted to avail themselves of the option which would be afforded by the proviso which he was recommending. If they did not do so, it would make no sense for intermediaries further down the chain to contract out of the duty to refund.

19. Mr. TARKO (Observer for Austria) said that his views were similar to those expressed by the representative of Germany and the observer for Switzerland. He believed that article 13 should provide exceptions to the mandatory duty to refund. The proviso suggested by the Chairman might be acceptable, but its present wording could lead to divergent interpretations, whereas the German proviso had the merit of offering parties the alternatives of a transfer with or without a money-back guarantee.

20. Mr. DE BOER (Netherlands) agreed with the representative of Canada that the cost to the customer of opting for a money-back guarantee under the German proviso might be prohibitively high, and that systematic evasion of their liability by banks might be the result. He approved the text put forward by the Chairman, with a modification along the lines which had been suggested during the discussion.

21. Mr. JOLEC (Observer for Czechoslovakia) approved the proviso suggested by Germany. It was consistent with the principle of freedom of contract and reflected current banking policy and practice in the matter of credit transfers.

22. Mr. BURMAN (United States of America) said that the basic proposition in article 13 was very close to that selected for United States domestic law; it reflected a fundamental compromise with commercial users and was an element of what the United Kingdom representative had referred to as a "bargain". Any exception which was provided to a guarantee, however reasonable, obviously changed the nature of that guarantee. The concerns voiced in the discussion indicated that the matter required further careful scrutiny.

23. The CHAIRMAN noted from a show of hands that the prevailing view seemed to be that the Commission should continue to seek a text for paragraph 2 of article 13 in which the first sentence of the paragraph would contain a more stringent formulation of the proviso he had suggested at the previous meeting (A/CN.9/SR.458, para. 68). Accordingly, he invited the Commission to consider the following wording for that sentence: "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular order due to exceptional circumstances because of an unusual risk involved in the credit transfer."

24. In reply to a question put by Mr. CRAWFORD (Canada), the CHAIRMAN exressed the opinion that the wording he had just suggested would eliminate the risk of originator's banks systematically including exculpatory clauses in their terms of business for credit transfers; and that it would render further reference to that eventuality superfluous.

25. Mr. BONELL (Observer for Italy) said that he had some difficulty in understanding the reference to prudence in the Chairman's text and even greater difficulty in reconciling it with the mention of exceptional circumstances and unusual risk.

26. Mr. SCHNEIDER (Germany) preferred the Chairman's original suggestion for the first sentence of article 13(2). Prudent banking was a concept relevant to the matter under discussion; the new wording watered down the concept and limited the possibility of interpreting it. Cases which could by no means be qualified as exceptional might well occur in which it would be imprudent to make international credit transfers.

27. He believed that the Canadian objection to his own delegation's proviso might be overcome by including in it a reference to an adequate price.

28. Mr. CRAWFORD (Canada) said that in his view prudent banking was not a generally recognized criterion but that a court might equate it with reasonable conduct on the part of a bank.

29. He was not sure that it would be advisable, if the Chairman's new wording was accepted, to retain in article 13(2) the exclusion which it contained at present.

30. Mr. ABASCAL ZAMORA (Mexico) shared the views expressed by the observer for Italy. There might be several different ways of interpreting the notion of prudence. He saw no unambiguous definition of the term in law. The Model Law must be quite clear on the matter of the duty to refund.

31. Ms. JAMETTI GREINER (Observer for Switzerland) said that in her view the Chairman's original suggestion had much to recommend it.

32. The CHAIRMAN said that he would reintroduce his original suggestion for the first sentence of paragraph 2 of article 13 with a slight modification. It now read: "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a

(The Chairman)

particular payment order because of a significant risk involved in the credit transfer". The Commission would note that the only change was the replacement of the words "execution of that payment order" by the words "credit transfer".

33. Mr. GREGORY (United Kingdom) said he thought it necessary, since the proviso no longer mentioned exceptional circumstances and unusual risk, that the paragraph should include a reference to the systematic use of the provisions of paragraph 1 of the article.

34. Mr. FELSENFELD (United States of America) agreed.

35. Mr. GRIFFITH (Observer for Australia) supported the views expressed by the two previous speakers. He would be prepared to support a text worded along the lines just indicated by the Chairman, but he believed that the Drafting Group should review it before the Commission considered it further.

36. Mr. ERIKSSON (Observer for Sweden) said that the addition to the modified form of the Chairman's original proviso of the words "due to exceptional circumstances" would make its intention clearer. Without it, the text might suggest that a bank could enter into arrangements varying its duty to refund in all cases in which it was dealing with a particular country. In his view, that should not be allowed.

37. Mr. SCHNEIDER (Germany) pointed out that the issue was not simply a drafting problem but concerned the situation in the European Economic Community, in which standard contracts would most probably be introduced in the near future.

38. Mr. SOLIMAN (Egypt) observed that article 13 dealt with the non-completion of a credit transfer; for example, because the payment order was cancelled, because an error occurred or because certain conditions were placed on it. Small banks were the most likely to lose in such situations. The present drafting of the text was very comprehensive and he found it perfectly satisfactory.

39. Mr. BONELL (Observer for Italy) said that, in his opinion, the second sentence of article 13(2) should be retained. He suggested that the text of article 13 might be clearer if the existing first sentence of paragraph 2 was deleted and a third paragraph was added concerning the possibility of agreements which varied the obligation to refund.

40. Mr. AL-NASSER (Observer for Saudi Arabia) said that the question of differences in exchange rates should be mentioned in dealing with the topic under consideration.

41. The CHAIRMAN asked the Commission if it wished to adopt, for addition to the first sentence of article 13(2) as proposed by the Working Group, the modified formulation of his original proviso for that sentence, namely the

(The Chairman)

words "except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer".

42. It was so agreed.

43. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 13(2) mentioned the suspension of payment or the prevention of a refund by an intermediary bank. Since those steps might also be the act of the beneficiary's bank, the sentence should refer to the beneficiary's bank as well.

44. Another matter to which the Commission should devote attention in considering article 13 was that a difficulty could arise with a credit transfer, not as the result of a fault of the originator, the intermediary bank or the beneficiary's bank, but simply owing to a failure of the message transmission system.

45. Mr. ABASCAL ZAMORA (Mexico) said that the change suggested by the Banking Federation of the European Community seemed to imply that article 13 offered no money-back guarantee if an intermediary bank was unable to receive funds from the beneficiary's bank. In his view, that eventuality might arise in two ways: first, if the intermediary bank sent funds in advance to the beneficiary's bank and for some reason the money could not be refunded; and secondly, if the intermediary bank sent the beneficiary's bank funds but a revocation order supervened. Was the suggested amendment intended to cover those two cases?

46. The CHAIRMAN said that it seemed logical that the person who specified a beneficiary's bank should bear the same risk as the person who specified an intermediary bank.

47. Mr. CRAWFORD (Canada) said that, though the second sentence in article 13(2) might appear to support the Chairman's view, practical considerations might have more weight.

48. Mr. FELSENFELD (United States of America) pointed out that some of the questions under discussion would also arise in connection with article 17. A form of words might possibly be found to cater for the point raised by the Mexican representative, but perhaps the best course would be to leave the second sentence of article 13(2) as it was.

49. Mr. GREGORY (United Kingdom) shared the point of view expressed by the Canadian representative. Article 13(1) was capable of applying to the beneficiary's bank in very limited circumstances, but article 13(2) should not so apply.

50. Mr. BOSSA (Observer for Uganda) asked whether the originator's bank mentioned in the first sentence of article 13(1) and the receiving bank mentioned in the second sentence of article 13(2) were one and the same.

51. The CHAIRMAN pointed out that, under article 2(g), the term "receiving bank" included both the originator's bank and the beneficiary's bank.

52. He asked the Commission whether it accepted the suggestion to include a reference to the beneficiary's bank in the second sentence of article 13(2).

53. The suggestion was rejected.

The meeting rose at 12.35 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 460th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 24 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 13 (continued)

1. Ms. KOSKELO (Observer for Finland), introducing her Government's proposal (A/CN.9/347, p. 25) to replace the second sentence of article 13(1) by the following words: "However, a receiving bank that has issued a payment order inconsistent with the payment order accepted by it is not entitled to a return of funds from its receiving bank", said that it was connected with her Government's suggestion concerning article 17(1). It should be made clear that the credit transfer was completed when the beneficiary's bank accepted a payment order to the benefit of the beneficiary designated in the originator's payment order. In other words, in the case of an erroneous execution by a bank in the transfer chain whereby the beneficiary who received the funds was not the beneficiary designated by the originator, the situation should be treated as one in which the transfer had not been properly completed and the provisions of article 13 should apply.

2. However, in her delegation's view, the money-back rule set out in article 13 should operate in such a way that the bank which had perpetrated the erroneous execution would be obliged to refund the money to the sender. That bank would not be entitled to any refund other than by way of recovery from the person who had been erroneously given the funds.

3. Mr. GREGORY (United Kingdom) said that the Finnish Government's proposal raised some tricky questions. It was necessary to distinguish between a situation in which the money involved passed through the hands of a person or entity other than a bank and that in which it passed through a bank.

4. If it passed through a bank which was not the beneficiary's bank and was then lost, the risk of the money-back guarantee seemed to rest with the last bank involved before the funds were lost, a bank which might have had no way of knowing that it was not the bank designated in the originator's payment order. In such a situation, it might be that some shift of the risk would be appropriate. On the other hand, he did not think that the Finnish proposal was the solution, because it prevented the bank which had made the mistake from ever obtaining a refund. That was clearly inappropriate because, if the next bank in the chain was able to refund the money, it should do so.

5. The Commission would appear to be introducing a further element of fault-based liability that was not covered by article 16, which applied only when the transfer had been completed. In that connection, it should not be forgotten that article 13 applied in cases where the transfer had not been completed.

6. Another situation that should be considered was one in which the funds, having reached the beneficiary's bank, were credited to the wrong account. That raised a very difficult question since, according to the Law, the acceptance of the order by the beneficiary's bank completed the transfer.

7. Mr. SCHNEIDER (Germany) said that there were a number of cases which were not covered by article 13. One such case was that of a payment order which was passed to a bank which refused to accept it. Another situation, where there was no money-back guarantee, was that of an originator who was seeking to recover his funds from a second or third intermediary bank.

8. Mr. ABASCAL ZAMORA (Mexico) said that the concern expressed by the Finnish delegation might be met by inserting a provision similar to that embodied in article 11(7) where, if the credit transfer had been completed but a receiving bank had executed a revoked payment order, the receiving bank had the right to recover from the beneficiary the amount of the credit transfer.

9. Mr. BURMAN (United States of America) said that the Model Law, which was a delicately balanced proposal where each article depended on the operation of others, worked under the general concept of the money-back guarantee. Consequently, where a transaction had not been completed, the funds were returned to the originator who then had an opportunity to initiate the transaction once again. The Commission could not possibly provide for every conceivable situation and he thought that it would be preferable to retain the original text.

10. In reply to a question by Mr. GREGORY (United Kingdom), Ms. KOSKELO (Observer for Finland) said that the purpose of her Government's proposal was to determine which party within the credit transfer chain would have to bear the burden of recovering funds from the wrong beneficiary. According to the existing text, the bank that committed the erroneous execution would itself be entitled to a refund from its receiving bank and the burden would thus be borne by a bank which, under article 7(2), was innocent.

11. Mr. BURMAN (United States of America) informed the Commission that, with regard to netting schemes, his delegation and that of the United Kingdom were seeking to achieve an acceptable text, as the Chairman had asked them to do. It was still his delegation's conviction, however, that multilateral and some bilateral netting systems would be unable to work with a "skip" rule.

12. Mr. GREGORY (United Kingdom), having confirmed that his delegation and that of the United States were still trying to reach an accommodation on a "skip" rule text, said that the same argument applied to the refund under article 13 as to revocation under article 11 and there was no reason to use different language.

13. The CHAIRMAN said that there were similarities between the attitudes of members of the Commission to article 13 and article 11, as far as the United Kingdom proposal for the so-called "skip rule" was concerned. Having taken an indicative show of hands, he noted that, subject to any modification needed with regard to netting, the United Kingdom proposal was strongly supported.

14. Mr. SCHNEIDER (Germany) said there might be other ways of dealing with the problem which would arise in the absence of a skip rule, whereby the originator might have no means of getting his money back. He proposed the insertion in article 13(1) of the words: "If a credit transfer cannot be

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completed, the originator is entitled to the return of any funds which the intermediary bank has received and not paid in executing the payment order." That would deal with the problem of a lack of money-back guarantee where there were special circumstances.

15. Mr. VASSEUR (Banking Federation of the European Community) said that his Federation was concerned about a situation which, though rare, was not unimportant, namely, the case when a non-recoverable loss of funds occurred without the originator, his bank, the intermediary bank or the beneficiary's bank making any mistake whatsoever. Compensation would be available through SWIFT, to a limited extent only, but the originator's bank would remain obligated to the originator for a complete reimbursement of the funds. If the answer to his question lay in article 13, it was not apparent to him.

16. The CHAIRMAN said that, in a sense, the banks would surely be obligated.

17. Mr. VASSEUR (Banking Federation of the European Community) said that the originator's bank would be unable to recover the funds, owing to the limitation of liability, and would therefore be the loser. He suggested that the situation might be brought closer to that covered by the second sentence of article 13(2), the case in which the originator's bank had chosen the intermediary bank. A transfer order which was intended to go through the SWIFT network, with the originator's bank's knowledge, would carry some right to repayment.

18. The CHAIRMAN thought that that solution would be too favourable to the originator's bank. Unless there were very strong feelings among the members of the Commission in favour of the insertion of some such provision in the Model Law, he did not think it would be advisable, but a reference to the problem might be included in the Commission's report.

19. Mr. ABASCAL ZAMORA (Mexico) said that he was not altogether happy at the prospect of interpretations of the Law being consigned to a commentary, despite the undoubted usefulness of the Secretariat's comments (A/CN.9/346, pp. 74-75, paras. 19-22). There were many excellent reasons why the inclusion of a clause covering certain cases of exception in the text of the Model Law itself should be considered.

20. The CHAIRMAN noted, after a show of hands, that there was a substantial majority in favour of including a clause covering certain cases of exception. He took it, therefore, that the Commission approved, in principle, the inclusion of such a clause.

21. It was so decided.

22. Mr. GREGORY (United Kingdom) said, in connection with the point made by the representative for Germany and the wording he had suggested to give an originator a direct right of action, that the text for article 11 which his

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own delegation was discussing with the delegation of the United States did not appear to overlap with the German proposal. Success in the discussions therefore would not weaken the case for tackling that problem.

23. To his way of thinking, the money-back guarantee had always been regarded as additional to the ordinary rights of the originator to get his money back. It was not a substitute for any restitutionary remedies which the originator might have, should he wish to go to the country concerned and pursue the bank involved. The money-back guarantee had been intended as an easier remedy, rather than an alternative one.

24. The sticking point was once again article 16(8), which purported not only to cover the remedies contained in that article for breach of provision but also to exclude all other remedies. It was important that, when the Commission came to consider that provision, it should not exclude ordinary restitutionary remedies, such as an originator might have against a bank in any particular country should he wish to go there in their pursuit.

25. While the Commission should be wary of giving any general right to the originator without considering very carefully what its nature would be, it was unclear whether the law of any particular country would confer on the originator anything more than a claim in damages. He might not be able to identify his money. He might only have a claim against the bank concerned. The matter required very careful thought.

26. Mr. FELSENFELD (United States of America) said he could not agree that the money-back guarantee was an addition to the rights otherwise existing under the law. To his mind, a right as fundamental to the working of the Model Law as the money-back guarantee was an independent right, separate from other rights, designed to be exercised on its own terms with all the benefits and supports and qualifications that the Model Law conferred. He agreed that article 16 might provide the opportunity to discuss the matter, which his delegation had not intended to raise. Once it had been raised, however, it ought to be settled.

Article 14

27. The CHAIRMAN said that the Government of Canada had proposed a drafting change to the article (A/CN.9/347, p. 12). If he heard no objection, he would take it that the Commission wished to submit that proposal to the Drafting Group.

28. It was so decided.

29. The CHAIRMAN said that the observer for Finland had suggested the insertion of a reference to the provision concerning charges (article 17(3)) so as to ensure its application.

30. The CHAIRMAN said that there was a close connection also between article 14 and article 7(2). Where correction for an underpayment was needed, no additional charge should be incurred. The Netherlands proposal that article 16(5) should be deleted also had a bearing on article 14.

31. Mr. GREGORY (United Kingdom) said it should be made clear that the meaning of article 17(3) was that a credit transfer was not to be regarded as completed if less than the right amount was transferred, except where the difference was due to charges.

32. Mr. FUJISHITA (Japan) said that his Government's proposed amendment of article 14 (A/CN.9/347, p. 38) was prompted by a similar concern regarding the partial completion of a credit transfer. The opening words of the article: If the credit transfer is completed in accordance with article 17(1), ..." were unsatisfactory in that they implied that the credit transfer had been completed and that, even if the final amount accepted by the beneficiary's bank was less than the amount ordered by the originator, the transfer would still be regarded as completed. There seemed to be no way in which article 13 could be brought to bear.

33. The point was a very important one which could lead to a loss of confidence in the original route of credit transfer without the possibility of obtaining refund of the missing part by some other route.

34. Mr. CRAWFORD (Canada) said that his delegation found the reasoning behind the Japanese proposal (A/CN.9/347, p. 38) to modify article 14 and article 16(5) quite convincing and thus supported it. The proposal that they be deleted was going too far.

35. The CHAIRMAN said that, if article 14 were deleted, the effect would be that a receiving bank executing a payment order erroneously was under an obligation to issue a new payment order for the difference.

36. Mr. FELSENFELD (United States of America) said that the topic was a complex one that should not be tackled with undue haste. If article 14 was removed, it was not clear that it would be incumbent upon the bank that had made the erroneous transfer to provide the outstanding funds. At very least, there should be a provision stating that the funds should be made available within the original time period.

37. The CHAIRMAN said that it might be better to postpone further discussion of article 14 until a later stage of the session, in view of the fact that any decision would have implications for article 16(5).

38. For the sake of consistency, however, he suggested that the words "the credit transfer is completed in accordance with article 17(1), but" should be deleted.

39. It was so decided.

40. The CHAIRMAN informed the Commission that agreement had been reached on article 10(6), following consultation with the representative of Germany, and suggested that the Commission proceed to consider article 15, which was also the subject of a proposal for deletion. If it were deleted, article 11(7) could also be eliminated as falling outside the scope of the Model Law.

Article 15

41. Mr. GREGORY (United Kingdom) said that the issues raised by articles 14 and 15 were different. Article 15 covered the situation in which the beneficiary received more money than he should have, whereas the situation envisaged in article 14 was one in which the transfer had not been completed because the amount transferred was insufficient. It would be better to retain article 15, which was consonant with other references in the Model Law to cut-off of the acceptance by the beneficiary's bank.

42. Ms. KOSKELO (Observer for Finland) said that article 15 was too narrow and should not cover solely the situation of overpayment. It should be extended to cover the case in which an erroneous execution by a bank had resulted in payment to the wrong person.

43. Mr. CRAWFORD (Canada) said that he agreed with the observer for Finland. Any proposal to delete article 15 must be carefully considered in the light of the provision in article 16(8).

44. Mr. BURMAN (United States of America) said that the fundamental issue was whether there could be partial completion, and that issue should be carefully considered in the context of article 17 and elsewhere. The deletion of any one article might have far-reaching implications for the text as a whole.

45. It might help if it were understood what the banking system could and could not do. If the originator owed the beneficiary a specific amount and sent that amount, but payment was received in a lesser amount, the Model Law stated that the beneficiary had received that lesser amount: the relationship between the originator and the beneficiary, who might decide to accept the lesser amount as full or partial payment of the obligation or to return that amount and retain the obligation, however, was of much wider scope and embraced the whole range of contractual obligations between originator and beneficiary.

46. The CHAIRMAN said that it was his understanding that, when a beneficiary's bank accepted the payment order, whether the amount was insufficient, correct, or an overpayment had been made, the credit transfer was regarded as complete: there was thus no question of partial completion. He suggested that article 15 should be retained in its existing form.

47. Mr. SCHNEIDER (Germany) said that the United Kingdom representative had drawn attention to the differences between articles 14 and 15. Article 15 raised important questions of principle in that a beneficiary might not be aware of an overpayment: for example, if there was an ongoing business relationship between the originator and the beneficiary, the latter might assume that there had been an advance payment for delivery of goods. The

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article should therefore include a provision stating that the beneficiary was obliged to repay only if he was aware of the overpayment and was thereby enriched without cause.

48. Mr. FELSENFELD (United States of America) said that the German representative had touched upon an extremely complex area of law. The issues of when an overpayment had occurred or not and when payment might be retained or not had no place in the Model Law. It would suffice to refer in article 15 to "remedies otherwise provided by law".

49. Mr. CRAWFORD (Canada) said that he was concerned at the differing treatment of articles 14 and 15. Deletion of the opening words of article 14 would give rise to the inference that an underpayment was not completion, an inference reinforced by the text of article 17(3). However, that inference was not in keeping with the principle accepted by the Commission and the Drafting Group should be asked to find a way of removing it.

50. Mr. GREGORY (United Kingdom) proposed, to deal with the point raised by the representative of Germany, that the wording of article 15 be amended to read "... it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as may otherwise be provided by law" instead of "... as are otherwise provided by law".

51. The United Kingdom amendment was adopted.

52. Following an indicative show of hands, the CHAIRMAN said he noted that most members of the Commission were in favour of retaining the text of article 15 as amended. He took it, therefore, that the Commission wished to approve article 15, as amended.

53. It was so decided.

Article 11 (continued)

54. The CHAIRMAN invited the members of the Commission to consider article 11(7) and suggested that the United Kingdom amendment to article 15 should be applied to the last line of that paragraph, which would then read "... as may otherwise be provided by law".

55. It was so decided.

Article 12

56. The CHAIRMAN recalled that the United Kingdom Government had proposed (A/CN.9/347, p. 62) that the first line of article 12 be amended to read "Until the credit transfer is completed in accordance with article 17(1) ...", instead of "If the credit transfer is not completed in accordance with article 17(1)".

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57. The Government of Japan had proposed that the content of the cooperation should be further specified by including the words "in particular by offering and gathering necessary information such as the whereabouts of the funds" before the words "in completing the credit transfer" (A/CN.9/347, p. 37). It might be thought, however, that such action was already implicit in article 12.

58. The Government of Canada had proposed that article 12 be made a mandatory rule (A/CN.9/347, p. 12), but delegations were reluctant to make the article a heavy liability and, especially since article 7(2) was not mandatory, they might find the proposal hard to accept.

59. The Government of Canada had also proposed that the expression "the next receiving bank" in the third line of article 12 should be amended to read "its receiving bank" (A/CN.9/347, p. 11).

60. Mr. FUJISHITA (Japan) said that, in view of the Chairman's comment that the action requested by his Government under article 12 was already implicit, his delegation might be able to agree to the existing text if that understanding was confirmed.

61. Mr. FELSENFELD (United States of America) proposed that article 12 should be deleted. The text imposed on the banks an obligation of unknown scope. It was normal business practice for banks to assist in clearing up any imperfection in a credit transfer: the service they offered was part of the competitive process. However, the more a transfer cost a bank the more it would have to charge its customers. The obligation under article 12 was impossible to quantify or define and hence impossible to enforce.

62. Mr. LIM (Singapore) said he supported the Japanese proposal, but suggested that it be limited to assistance in the form of information. That might meet some of the United States concerns. In any case, with high-speed electronic systems, the gathering of information should not be a problem.

63. The CHAIRMAN pointed out that the Working Group had considered that the Model Law ought to refer to the kind of assistance mentioned in article 12, even if it was obvious. Moreover, no penalty was provided, since article 16(a) did not refer to a breach of article 12. That point might meet the concern of the United States representative.

64. Mr. DUCHEK (Observer for Austria) said that the provision was too vague and there was no sanction if the obligation was not fulfilled. He therefore supported the proposal that article 12 be deleted.

65. Mr. RENGER (Germany) said he thought that article 12 was essential and should be retained. Many intermediary banks were involved in transferring money and there were no contractual relations between an originator and the receiving banks further on in the chain. If the transfer was not completed, the originator still had to fulfil his obligation to the beneficiary and therefore needed the assistance of the banks involved, particularly in international transfers.

66. Following an indicative show of hands, the CHAIRMAN noted that there was a majority in favour of retaining article 12.

67. He asked whether the members of Commission agreed that the type of assistance proposed by the Government of Japan was implicit in the existing text.

68. Mr. FELSENFELD (United States of America) said that his delegation was unclear as to how such an understanding would be recorded. It would have to be made clear in some way or other that there would be no penalty for a breach of article 12.

The meeting rose at 5.15 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 461st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 25 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 12 (continued)

1. Mr. CONOBOY (United Kingdom), referring to his Government's proposal for an amendment to article 12 (A/CN.9/347, p. 62, para. 27), said that the article as drafted might imply that there would be a duty to assist only when the credit transfer mechanism broke down. Replacing the words "if the credit transfer is not completed" by the words "until the credit transfer is completed" would make it clear that there was a continuous duty to assist which was distinct from the money-back guarantee.

2. Mr. ADEDIRAN (Nigeria) said that the proposed amendment might not cover a situation involving the recovery of money when a credit transfer had to be aborted.

3. The CHAIRMAN explained that article 12 concerned the duty of all parties to assist in completing a credit transfer.

4. Mr. DE BOER (Netherlands) supported the proposed amendment, since it was in keeping with the intention of the article.

5. The proposal was adopted.

6. The CHAIRMAN announced that the proposal made by Japan (A/CN.9/347, p. 37, para. 12) had been withdrawn on the understanding that its substance was implicit in the article as drafted.

7. Mr. FELSENFELD (United States of America) said he understood that article 12 was generally acceptable to the Commission. His delegation, however, objected to the article, on the ground that it imposed on each receiving bank an obligation to assist the originator and each subsequent sending bank, whereas it was normal banking practice for a receiving bank to assist only the bank that sent a transfer to it and the bank to which it in turn sent that transfer. The duty to assist should therefore be confined within those limits. There was also the question of the penalty to be imposed for violation of the obligation which the article laid down.

8. The CHAIRMAN said that the question of liability might be discussed under article 16.

9. Mr. FELSENFELD (United States of America) said that the principal point at issue was whether the obligation should exist only towards the party sending the transfer.

10. Mr. SCHNEIDER (Germany) said that the article as drafted left room for interpretation regarding the party to whom the duty was owed and his right to ask for assistance. That was also true in regard to liability for any legal costs which might arise.

11. Ms. GOLAN (Observer for Israel) shared the United States view that the article should reflect normal banking practice and not impose new obligations on the parties. She suggested that the term "obligated" might be amended in such a way as to eliminate the implication that a contractual obligation existed.

12. Mr. FELSENFELD (United States of America) said that he would have difficulty in accepting the view expressed by the German representative, which seemed to indicate that a party would be obligated without the creation of an obligation.

13. The CHAIRMAN suggested that the wishes of the observer for Israel might be met if the provision referred to a duty instead of an obligation.

14. Mr. FELSENFELD (United States of America) welcomed that suggestion.

15. Mr. ERIKSSON (Observer for Sweden) said that the article must take into account the interests of parties other than banks. The rule as it stood favoured the originator. He shared the United States view that it was necessary to define the consequences of a breach of the duty which the article laid down. He approved the text as it stood.

16. Mr. CRAWFORD (Canada) said that the differing approaches of the United States and the German delegations to the issue of the nature of the obligation might stem from differences between civil law and common law. Under civil law, the duty would be similar to a legal norm and therefore less onerous than in a common law jurisdiction, where it would be considered a statutory duty, the breach of which would be a tort.

17. In response to the suggestion made by the observer for Israel, he proposed that the words "obligated to assist" in the second line of the text should be replaced by the words "obligated to use its best efforts to assist". That change, he thought, would address the problem in terms of a norm rather than a legally enforceable duty and would suggest a reasonable content of the duty.

18. Mr. SOLIMAN (Egypt) said that it would be inappropriate for the article to refer to an obligation, particularly in view of the absence of an attendant penalty. He proposed that the provision should refer to cooperation for the purpose of assistance.

19. Mr. ABASCAL ZAMORA (Mexico) said he believed that the idea that a bank should use its best efforts to assist a party would not satisfy some delegations. Since sanctions were to be attached to many provisions of the draft, it was desirable to postpone consideration of the wording until sanctions were clearly defined under article 16. A difficulty in establishing some sanctions was due to the fact that the Model Law was based on fluctuating interests, which could pass from one party to another; no real parameters existed for assessing the duty to assist, for example.

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20. The Commission should address the problem of the different interpretations which a civil law jurisdiction and a common law jurisdiction might place on article 12. In his view, article 12 stated who bore the obligation, so that the obligation would stem from the Model Law and not from a contract.

21. Mr. BONELL (Observer for Italy) supported the Chairman's suggestion that the provision should refer to a duty to assist. It should be incorporated in the Model Law in that form. The interpretation of the duty should be left to the applicable law. It would be impractical for the article to attempt to identify all the possible beneficiaries of the duty, or to define in detail notions such as using best efforts.

22. Mr. KOMAROV (Union of Soviet Socialist Republics) said that article 12 was generally satisfactory. To some extent it reflected existing banking practice, since banks cooperated in an attempt to assist their customers when difficulties arose. Perhaps the title of the article or the way the obligation was described should be changed. It was necessary to balance a bank's obligations against the flexibility existing in current banking practice. The Canadian proposal concerned the criteria to be used in measuring the scope of the duty and it deserved consideration. Banks should be bound to assist parties to a reasonable extent within the normal range of banking practice.

23. Mr. BURMAN (United States of America) welcomed the approach taken by the representative of the Soviet Union, who had emphasized the cooperation which existed in the banking system. Unlike the representative of Italy, he himself thought that it was important for article 12 to define the obligations and beneficiaries involved. Assistance could comprise many services that might entail large amounts of money being spent on a credit transfer which was for a small amount. It would be unwise for the Model Law to create unlimited legal obligations in article 12 after having prescribed strictly limited obligations in respect of prior stages of a credit transfer.

24. The CHAIRMAN wondered whether the concerns of the delegation of the United States of America might be mitigated if it were understood that article 12 constituted a statutory obligation, not a contractual one. In that case, perhaps, liability for damages would be excluded by the provisions of article 16(8).

25. Mr. BURMAN (United States of America) said that when countries adopted the Model Law, they would do so on the advice of banking supervisors. The article under discussion would not be adopted if there was no legal penalty for a breach of the obligation which it laid down. First, however, it was necessary to define the nature of the obligation, and who was obligated to whom.

26. U NYI NYI THAN (Observer for Myanmar) supported the proposal made by the representative of Canada. It represented a wise compromise in view of the fact that the Model Law was intended to cover banking world-wide.

27. Mr. ADEDIRAN (Nigeria) said that the Model Law should not impose obligations on banks that they would be unable to discharge. Thinking in terms of the Canadian proposal, he believed that for as long as the credit transfer was not completed, banks should be enjoined to use their best endeavours to assist in completing it. That would be the best outcome from the originator's point of view.

28. Mr. BONELL (Observer for Italy) agreed with the United States delegation that a duty without a sanction might prove unacceptable. Although it was a somewhat unusual situation, there were precedents for it in international instruments. For example, the recently concluded United Nations Convention on the Liability of Operators of Transport Terminals in International Trade focused primarily on liability for loss or damage to goods. In addition, however, it laid down ancillary duties aimed at achieving a balance between the parties, such as the duty to assist in tracing lost goods. It had not been possible to define that duty in detail, but its inclusion in the Convention had nevertheless been felt to serve a useful purpose. He thought that in the present case the Canadian proposal to mention best efforts was a fair compromise.

29. Mr. BOSSA (Observer for Uganda) said that the obligation to assist was already implicit in the various obligations existing between the parties under other articles of the Model Law. He therefore wondered if article 12 was really needed.

30. Mr. PARKER (Observer for Australia) said that article 12 clearly defined the parties to whom and by whom a duty was owed, namely the originator, subsequent banks and the next receiving bank. To some extent, he shared the concerns of the United States delegation regarding the extent of the duty. In his view, the key to the provision lay in the words "in completing the credit transfer". The duty was thus limited to carrying out normal banking procedures. In order to make the scope of the obligation quite clear, that phrase might be expanded to read "in completing the banking procedures of the credit transfer".

31. The CHAIRMAN suggested that article 12 might be approved on the understanding that it laid down a statutory obligation, and that the following changes might be made to it in order to clarify the way in which the Commission understood it: first, the reference to an obligation to assist would be replaced by a reference to a duty to assist, thus attenuating the force of the requirement; secondly, the suggestion of the observer for Australia to refer explicitly to banking procedures would be implemented, thus limiting the scope of the duty.

32. Mr. BURMAN (United States of America) said that the Chairman's suggestion went a long way towards accommodating his delegation's concerns, but its basic objection to the article remained.

33. The CHAIRMAN invited the Commission to approve article 12 on the basis he had just suggested, with the wording being left to an informal drafting group which would include the representative of the United States of America and the observer for Australia.

34. It was so decided.

Article 10 (continued)

Article 10(1) (A/CN.9/XXIV/CRP.6)

35. The CHAIRMAN invited the Commission to consider the proposal which Switzerland and the United States had made for article 10(1) in document A/CN.9/XXIV/CRP.6. The proposed wording was intended to give effect to the delicately balanced decision taken by the Commission at its 452nd meeting (A/CN.9/SR.452, para. 32) that while same-day execution of payment orders should be a basic principle of the Model Law, a day's grace might be accorded to banks unable to comply with that rule.

36. Mr. GRIFFITH (Observer for Australia) submitted that the understanding which the Commission had reached would be reflected more accurately by words to the effect that the receiving bank was required to execute the payment order, if reasonably practicable to do so, on the business day it was received, or otherwise on the business day after receipt. In his view, the text under consideration gave the misleading impression that first-day execution was no more than an option.

37. The CHAIRMAN said that the Commission had been at great pains to avoid the use of terms, such as "reasonable", which could give rise to differences of interpretation or suggest a requirement of justification. His own understanding was that the Commission had agreed that while first-day execution should - as he had said - be the general rule, execution on the following day would be possible without sanctions. Perhaps the concerns of the observer for Australia might be met through the insertion of the words "in principle" after the words "payment order".

38. Mr. GRIFFITH (Observer for Australia) said that he would prefer the insertion of the word "normally" at that point.

39. In response to a comment made by Mr. ABASCAL ZAMORA (Mexico), the CHAIRMAN said that any imprecision in the draft in regard to the use of the terms "banking day" and "business day" would have to be resolved by the Drafting Group.

40. Ms. KOSKELO (Observer for Finland) suggested that the insertion in the text of the joint proposal of the word "feasible" after the words "if not" might meet the concern expressed by the observer for Australia.

41. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation would be unwilling to endorse the Finnish suggestion, since to introduce the notion of feasibility would bring with it the need to consider where the burden of proof lay, as well as the risk of challenge or even litigation when first-day execution did not take place. His preference was for the text proposed by Switzerland and the United States of America.

42. Ms. JAMETTI GREINER (Observer for Switzerland), supported by U NYI NYI THAN (Observer for Myanmar), favoured the inclusion of a reference to principle rather than feasibility.

43. Mr. BOSSA (Observer for Uganda) suggested that if the basic understanding was that the delay in execution should under no circumstances exceed two days, the text might read: "The receiving bank is required to execute the payment order on the business day it is received but in any case not later than the following business day."

44. The CHAIRMAN asked whether, in the light of the discussion, the Commission could endorse the following wording: "The receiving bank is required to execute the payment order in principle on the business day it is received or, if not, at the latest on the business day after it is received, unless ...".

45. Mr. CRAWFORD (Canada) wondered whether the principle itself might not be reinforced by making it the subject of a shorter sentence, which would be followed by a second sentence setting out the attendant liabilities or obligations.

46. The CHAIRMAN said that in the absence of any objection, he would take it that the Drafting Group might be entrusted with the preparation of a revised version of the joint proposal for article 10(1) in document A/CN.9/XXIV/CRP.6; and that at an appropriate place in the text, without any modification of the substance of the provision, the notion of principle might be inserted.

47. It was so agreed.

Article 10(1)(bis) (A/CN.9/XXIV/CRP.6)

48. The CHAIRMAN invited the Commission to consider the second part of the proposal in document A/CN.9/XXIV/CRP.6. It called for the draft to contain an article 10(1)(bis) according to which, irrespective of the day of execution of the payment order, value must be given as of the date of receipt of the order. He himself, in the interests of clarity, suggested that the final phrase of the proposed text might read: "... the receiving bank must account for value as of the date of receipt".

49. Mr. ABASCAL ZAMORA (Mexico) said that, at least in the Spanish version, the final part of the proposal was unintelligible. He asked whether it should not refer to interest rather than to value.

50. The CHAIRMAN said that the problem alluded to by the previous speaker was probably one of translation.

51. Mr. BERGSTEN (Secretary of the Commission) remarked that the point raised by the representative of Mexico had substantive connotations. The words "value" and "interest" were not simply interchangeable; for example, the question of reserve requirements might be involved.

52. Mr. MORAN BOVIO (Spain) agreed that the matter was more than one of mere drafting. He believed that he was not alone in wondering whether the provision for the establishment of value on the date of receipt was not related to the calculation of interest for the period which might elapse between receipt and transmission.

53. The CHAIRMAN said that the proposal was intended to ensure - no more and no less - that if the beneficiary's bank delayed executing a payment order until the day following receipt, the beneficiary would be credited as of the date of receipt. The question whether interest would accrue to the beneficiary would depend on the relationship between the beneficiary and the beneficiary's bank.

54. Mr. AL-NASSER (Observer for Saudi Arabia) suggested, on the basis of the Arabic version, that a generally acceptable wording might be: "The receiving bank must execute the payment order on the basis of its value on the date of receipt even if it does so on the day following receipt."

55. Mr. GRIFFITH (Observer for Australia) asked whether the text before the Commission implied that one day's interest would be payable.

56. The CHAIRMAN said he believed that in ordinary cases that might be so.

57. Mr. GREGORY (United Kingdom) submitted that the reply to the question would depend on whether or not an interest-bearing account was involved.

58. Mr. GRIFFITH (Observer for Australia) said it was his understanding that the Commission's original intention had been to provide for a default consequence for the day's delay; the provision would be largely meaningless if that consequence, in the form of an obligation to pay interest, arose only when an interest-bearing account was involved.

59. The CHAIRMAN said that there had been no question of imposing a penalty. It was simply the expectation of the Model Law that, since the subject-matter of the transfer had been received, it must be credited at its value on the day of receipt. One reason for that was to avoid difficulties which might arise from the dating of a cheque drawn by the beneficiary. The Model Law did not address the question of interest.

60. Mr. BERGSTEN (Secretary of the Commission) remarked that although article 10(1) now required the beneficiary's bank to execute a payment order by the day after receipt at the latest, he doubted whether that had been the Commission's specific intention. Article 9(1) stipulated that the beneficiary's bank must place the funds at the disposal of the beneficiary in accordance with certain conditions, but it said nothing about the time for doing so. That omission had of course been deliberate, because it was an essential part of the policy underlying the Model Law that it should not go into the relationship between the beneficiary's bank and the beneficiary. While that policy had been breached on a number of occasions, and for very good reasons, one of the questions deemed to lie completely outside the purview of the Model Law was that of the moment when the credit had to be placed at the disposal of the beneficiary: that was a matter which lay at the heart of the relationship between the beneficiary and the beneficiary's bank. Consequently, while agreeing in great measure with the Chairman's analysis of the words before the Commission, he could not concur with his conclusions as to what they were intended to convey.

Article 6 (continued)

Article 6(3) (A/CN.9/XXIV/CRP.7)

61. Ms. KOSKELO (Observer for Finland) asked how the text proposed for article 6(3) would affect the provisions concerning deemed acceptance in article 6(2). What did the extra day allowed for giving notice of rejection imply for the benefit that a bank might derive from the "float"? If a bank knew that it would always benefit from the "float" it would probably be inclined to ignore article 10(1) and rely on the rules governing deemed acceptance.

62. Mr. GREGORY (United Kingdom) pointed out that the Drafting Group had decided that the opening words of article 6(2)(a) as reproduced in the Working Group's text (A/CN.9/344) should be amended to read: "when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given".

63. The question of "float" was a substantive issue which he believed related to article 10(1)(bis). It did perhaps require further consideration but it should not affect article 6(3).

64. Mr. CRAWFORD (Canada) said that the question of "float" was a complicated subject. The Commission should, he believed, focus on the one aspect of it which the Model Law should address, namely the time value of funds in the banking system which were known by that name. As he understood it, the Commission had decided that a bank should not be permitted to derive benefit from the "float" by delaying execution of a payment order. That was the only point the Commission should deal with; the question whether an account showed a credit or a debit balance or whether it was interest-bearing was irrelevant.

65. Ms. KOSKELO (Observer for Finland) suggested that it might be advisable to include a new provision in article 10 stipulating that a payment order must be executed in the event of deemed acceptance, so as to prevent banks from drawing benefit from the extra day granted for execution.

66. Mr. GREGORY (United Kingdom) agreed.

67. The CHAIRMAN suggested that the Drafting Group might prepare a text for that purpose.

68. Mr. SCHNEIDER (Germany) said that the allocation of "float" was a very important question which affected not only article 10 but other parts of the Model Law - the provisions regarding rejection of payment orders, for example. He wondered whether the proposed new provision should not be a separate article rather than simply an addition to article 10.

69. The CHAIRMAN pointed out that some of the provisions of article 16 already related to "float" and that a new proposal for parts of that article had been put forward in document A/CN.9/XXIV/CRP.10.

70. Ms. KOSKELO (Observer for Finland) said she believed that, as far as rejection of a payment order was concerned, the matter would be covered by article 13(1).

71. Mr. MORAN BOVIO (Spain) shared the views expressed by the German representative. It seemed to him that the whole question of float required further investigation.

72. Mr. SCHNEIDER (Germany) pointed out that article 13 referred to the originator's bank. He reiterated his view that it would be best to group all provisions concerning the allocation of "float" in a single article.

The meeting rose at 12.45 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 462nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 25 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.12 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 12 (continued)

1. The CHAIRMAN said that the Australian delegation had provided a new wording for the last five words of the article, which was acceptable to the United States delegation. The paragraph would accordingly end with the words: "... in completing the banking procedures of the credit transfer."

2. If he heard no objection, he would take it that the Commission wished to approve article 12, as thus amended.

3. It was so decided.

Article 6 (continued)

Article 6(4) (continued) (A/CN.9/XXIV/CRP.7)

4. Mr. GREGORY (United Kingdom) said that the words "is cancelled", in the first line of the ad hoc drafting group's proposal (A/CN.9/XXIV/CRP.7), should be revised to read "ceases to have effect".

5. Mr. VASSEUR (Banking Federation of the European Community) said that, on the basis of the French version of the proposal, he could see no reason for the change.

6. The CHAIRMAN explained that, in other parts of the Model Law, reference was made to revocation and cancellation. The change was intended to avoid confusion.

7. Mr. FELSENFELD (United States of America) said that he had a small comment on the language of article 6(4), as it appeared in A/CN.9/XXIV/CRP.7. He understood that some further changes had been made by the ad hoc drafting group and would assume that they were being taken into account.

8. Mr. GREGORY (United Kingdom) said that, while the reference to the period being determined by law, agreement or rule of a fund's transfer system seemed to embody the Commission's thinking, the second sentence of the paragraph seemed to call for a policy decision by the Commission.

9. Mr. BERGSTEN (Secretary of the Commission) said that, when the words "before the expiry of any period determined by law" had been discussed, it had been assumed that no one knew of any law other than the Model Law and, possibly, article 4A of the Uniform Commercial Code which would cause the payment order to be cancelled after such a short period of time. If there was no such similar law, a statute of limitation or prescription would apply but the period would run not for days but for years. Variation by agreement was already dealt with in article 3.

(Mr. Bergsten, Secretary of the Commission)

10. It had been acknowledged in the drafting group that the question of the rule of a funds transfer system was somewhat different, but the group had not been sure exactly how it went beyond an agreement. In any case, there had been a feeling that the presence of the words "law, agreement" etc. served no useful purpose. The drafting group had therefore agreed on some further changes, whereby the new proposed text would read "A payment order is cancelled if it is neither accepted nor rejected under this article on the fifth banking day before the close of business following the latest day the order was required to be executed." The text in question would shortly appear in document A/CN.9/XXIV/CRP.5/Add.2.

11. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the text of article 6(4), as orally revised by the Secretary, on behalf of the drafting group.

12. It was so decided.

Article 7 (continued)

Article 7(5) (continued) (A/CN.9/XXIV/CRP.8)

13. Mr. GREGORY (United Kingdom) said that the ad hoc drafting group's discussions had not gone beyond the first sentence of the paragraph, since the remainder could not be finally drafted until points of policy had been resolved.

14. Mr. CRAWFORD (Canada) said he noted the use of the lengthy expression "the latest day the order was required to be executed ..." in articles 3 and 4. He thought it would be needed again in article 7(5), since a reference merely to the time required by article 10 would be incomplete.

15. What the Commission would have to face was the fact that it had created a period during which execution, though proper, was not required unless the bank decided to accept the payment order. He wondered whether there would be any objection to asking the Drafting Group to find an expression such as "execution period", complete with a definition, to simplify the communication of a basically very simple idea.

16. Mr. GREGORY (United Kingdom) said he doubted whether the plenary meeting was the appropriate place to discuss such technical drafting questions. On the point raised by the Canadian representative, however, he pointed out that the expression in the third line of the proposed text: "time required under article 10" was a reference to article 10(2) and not to article 10(1).

17. Mr. SCHNEIDER (Germany) said he would like some clarification of the effect of the change made to article 7(5) on detection. In particular, he wished to know what would happen if a bank acted negligently and did not detect inconsistency.

18. The CHAIRMAN said that the change had come about because, when the notion of detection had been introduced by the delegation of the United Kingdom in article 7(3), subsequently deleted, the word "detects" was held to entail no obligation. The discussion and subsequent drafting had therefore proceeded on the basis that failure to detect was not negligence, and it had been agreed that the same technique should be used with regard to article 7(4) and (5).

19. He noted that there was general agreement on the first sentence of article 7(5), as drafted by the United Kingdom representative, and asked the Commission whether, since the first sentence of article 9(4) was substantially the same, he might take it that that, too, was approved.

20. It was so decided.

21. Mr. FELSENFELD (United States of America) said that the desire to accommodate varying views among the delegations on what the Law should provide had led to one compromise after another.

22. From the outset, his delegation had been concerned at a tendency to concentrate unduly on the concept of consumer-related and lower-speed transfers, entailing higher costs, rather than on the type of high-speed, low-cost, electronic transfers that had come into general use. It firmly believed that the burden on receiving banks should be kept as low as possible so as to enable them to execute high-speed, low-cost transfers for the small charges that had become so acceptable and agreeable to the business community. Every burden on the receiving bank necessarily slowed down transactions and increased costs.

23. The first sentence of article 7(5), as redrafted, placed an obligation on the receiving bank to give notice of an inconsistency if it detected one. That in itself was already a compromise but it was a compromise with which his delegation could live. It would not unduly upset high-speed transfers, although it would tend in that direction. Nevertheless, violation of the obligation to give notice carried a penalty, and he was sure that that would give rise to further discussion later on.

24. Subject to more thorough study, he thought agreement might be reached on the third and fourth sentences; the second sentence went too far, however, and was completely unacceptable to his delegation.

25. Mr. DE BOER (Netherlands) suggested that the objections of the United States delegation could be met by retaining the first sentence only. The aim should be to combine consistency with practicality. It should be remembered that an error, including a discrepancy, might be dealt with under article 4.

26. The CHAIRMAN said that the last sentence of article 7(5) was in keeping with a substantive decision of the Commission, which clearly indicated that the detection element would not extend to fraud and thus would take care also of the concern voiced by the representative of Germany.

27. Mr. CRAWFORD (Canada) said that, in effect, the second sentence of the paragraph allowed a person executing a mandate to choose which part of that mandate he would execute, namely, whether to pay the sum recorded in figures or in words, and thus to pay a greater or lesser amount. The sentence thus offered too little guidance, but he had difficulty in agreeing with the United States delegation that it should be deleted because of its unsuitability for high-speed transfers.

28. Mr. GREGORY (United Kingdom) said that the third and fourth sentences might be sufficient to take care of the problem.

29. Mr. SCHNEIDER (Germany) said that his delegation had a fundamental objection to the last sentence, which failed to distinguish between degrees of inconsistency, some of which might be glaring while others might be much harder to detect. The sentence should either be deleted or reformulated.

30. Mr. DUCHEK (Observer for Austria) said that he understood the hesitation expressed by the representative of Germany and the arguments put forward by the Canadian representative. In his view, the current text of article 7(5) would create a very unsatisfactory regime.

31. The CHAIRMAN said that it had been agreed at a previous meeting not to touch upon the question of responsibility for detection. Article 7(5) related merely to the fact of the detection, not to the scale of the inconsistency.

32. Mr. FELSENFELD (United States of America) said that the proposed text of the last sentence of the article was of comparatively recent date, and its implications had not been considered in depth. He suggested that it should be deleted.

33. The CHAIRMAN suggested that the best solution might be to adopt article 7(5), as contained in document A/CN.9/XXIV/CRP.8, the second and fourth sentences being deleted.

34. It was so decided.

Article 9 (continued)

Article 9(4) (continued) (A/CN.9/XXIV/CRP.9)

35. Ms. KOSKELO (Observer for Finland) said that her delegation had some difficulty with the last sentence of article 9(4) in the text proposed by the United Kingdom representative, since it was not consistent with paragraph 1 of the article, to which it referred. She accordingly suggested that it be deleted.

36. Mr. FELSENFELD (United States of America) and Mr. DE BOER (Netherlands) agreed with the suggestion by the observer for Finland that the last sentence of the paragraph should be deleted.

37. Mr. DUCHEK (Observer for Austria) said that the need to make progress in adopting the draft articles should not preclude a thoroughgoing discussion of their substance, particularly since the Commission was unlikely to complete its work at the current session.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 9(4), as contained in document A/CN.9/XXIV/CRP.9, the last sentence being deleted.

39. It was so decided.

Article 11 (continued)

Article 11(6)(bis) (continued)

40. MR. CONOBOY (United Kingdom) said that, with the help of the United States delegation, he had drafted a revision of the wording for a new article 11(6)(bis) originally proposed by his Government (A/CN.9/347, p. 61). The new paragraph would read:

> "A bank that is obliged to make a refund to its sender under paragraph (5) is discharged from that obligation to the extent that it makes the refund direct to a prior sender; and any bank subsequent to that prior sender is discharged to the same extent. This paragraph does not apply to a bank if it would affect the bank's rights or obligations under any agreement or rules of a funds transfer system."

41. The proposed wording could apply equally well to article 13, perhaps with minor drafting changes to reflect the context.

42. Mr. SCHNEIDER (Germany) said he wondered why, in the United Kingdom proposal, the originator was not given a direct claim on the intermediary bank so that he would have the right to bring an action against the intermediary in cases of insolvency. Since all were agreed that the funds should go back to the originator, the latter should have a direct claim.

43. Another reason for including such a provision was to start the process of defining the term "deposit", in connection with the insurance deposit scheme, discussion of which would shortly begin in another forum.

44. Mr. ADEDIRAN (Nigeria) said he supported the German proposal.

45. Mr. FELSENFELD (United States of America) said he also supported that proposal. In a bankruptcy situation, a skip payment would be facilitated if there could be a direct claim by the originator.

46. The CHAIRMAN suggested that the representatives of Germany, the United States and the United Kingdom should be invited to draft a text for addition to the one orally proposed by the representative of the United Kingdom.

47. It was so agreed.

48. The CHAIRMAN invited comments on article 11(8). The Drafting Group should be asked to deal with the drafting proposals that had been made regarding that paragraph. Since, however, according to the definitions, "sender" included "originator", the words "or the originator" might be deleted.

49. Mr. BERGSTEN (Secretary of the Commission) said that, while it was true that the originator was a sender, the word "originator" in article 11(8) had a different connotation. If the sender involved was the sender between the second and third intermediary banks, the originator died before completion of the credit transfer, and all the banks implementing the credit transfer were agents or sub-agents of the originator, the agency would die when the principal died. The word "originator" should therefore be retained, since it would make it clear that death, bankruptcy or incapacity did not terminate any authority, however the relationship between an intermediary bank and the originator was characterized.

50. The CHAIRMAN withdrew his suggestion.

51. Mr. CRAWFORD (Canada) said that that interpretation would be reinforced by amending the second line of the paragraph to read "... operate to revoke a credit transfer or payment order".

52. Mr. GREGORY (United Kingdom) said he was not sure that the concept of revoking a credit transfer existed.

53. Mr. VASSEUR (Banking Federation of the European Community) said that the term "revoke" in paragraph 8 was an inappropriate one, since article 11 envisaged revocation as an initiative on the part of the sender. No initiative was involved in death, bankruptcy or incapacity, and paragraph 8 should therefore refer to "expiry".

54. Referring to the definition of the word "bankruptcy" in the second sentence of the paragraph, he suggested that, since entities other than individuals and companies could be declared bankrupt, the wording ought to be "The word 'bankruptcy' includes all forms of insolvency whether they affect legal or physical persons".

55. The CHAIRMAN said that he thought that the meaning of "revoke" was clear and that the first sentence of paragraph 8 did not need to be changed. The second point made by the observer for the Banking Federation of the European Community would be considered by the Drafting Group.

56. Article 11(8) was approved, subject to possible amendment by the Drafting Group.

57. The CHAIRMAN invited comments on article 11(9).

58. Ms. KOSKELO (Observer for Finland) said she considered that the paragraph in question was too broadly worded. Its application should be limited to article 11(1) and (2).

59. Mr. CRAWFORD (Canada) said that the concept of branches as separate banks ought to apply to paragraphs 5 and 6 of the article also.

60. Mr. GREGORY (United Kingdom) said he fully agreed. He wondered, however, if the paragraph might not be acceptable as it stood on the understanding - already expressed - that the reference in the Model Law to branches and separate offices of a bank was not intended to convey any implication concerning the relationship between a branch and its head office, and that any question of financial liability that might exist between them was not of concern to the Model Law.

61. Article 11(9) was approved.

Article 17

62. The CHAIRMAN invited the members of the Commission to comment on paragraph 1 of article 17 and reminded them of the fact that the first sentence of the paragraph constituted the basis on which the Commission had discussed other issues.

63. The Commission would have to decide whether or not to retain the second sentence, which should be considered in the light of article 9(1).

64. Ms. KOSKELO (Observer for Finland) said that it should be made clear in the first sentence that the transaction was completed when the beneficiary's bank accepted a payment order for the benefit of the beneficiary designated in the originator's payment order.

65. The CHAIRMAN recalled that, in the discussion on articles 13 and 14, he had indicated that the Commission would proceed on the assumption that, whether or not there was an error in transmission, the time of acceptance was when a certain sum was accepted by the beneficiary's bank.

66. Mr. ADEDIRAN (Nigeria) said he agreed with the observer for Finland. There were situations in which a credit transfer might have been completed in accordance with article 17(1), but was not completed from the point of view of the originator. Wording should therefore be included to make it clear that a transfer was not taken to be completed until it was completed in accordance with the content of the payment order sent by the originator.

67. Ms. KOSKELO (Observer for Finland) said that her suggestion was designed for the situation in which, through some mistake during the credit transfer, the payment order which reached the beneficiary's bank indicated a beneficiary other than the one designated by the originator. In that case, the transfer should not be regarded as having been completed and article 13 should also apply.

68. Mr. LIM (Singapore) said that the word "completion" could mean different things to different people. He had initially thought that the word meant the discharge of the obligation. However, as things stood, he realized that it related only to the credit transfer itself and not to the discharge of the

(Mr. Lim, Singapore)

obligations of the parties in the credit transfer. That was a point that ought to be made clear in the article, lest it be thought that it also meant that all obligations had been discharged.

69. The CHAIRMAN said that paragraph 1 of article 17 was concerned with a credit transfer while paragraph 2 of the article referred to the discharge of an obligation.

70. Mr. YIN Tieou (China) said that a credit transfer originated with the originator and ended when the beneficiary received the funds. The wording of article 17(1) was not consistent with that definition, however, because it did not include the entire process. His delegation therefore supported the views of the representative of Nigeria and the observer for Finland.

71. Mr. AL-NASSER (Observer for Saudi Arabia), referring to the point raised by the observer for Finland, said that, in his experience, a credit transfer was always made by name.

72. Mr. FELSENFELD (United States of America), referring to the Finnish observer's statement, said he agreed that, where the payment order accepted by the beneficiary's bank was not to the credit of the beneficiary designated by the originator, the transfer should not be regarded as complete.

73. With respect to the point made by the representative of Nigeria, he said that, if the payment order was for a lesser amount than that specified by the originator, the credit transfer should be regarded as complete to the extent of the payment. In that regard, a sentence could be included in paragraph 1 stating that a credit transfer was completed to the extent that payment had been made.

74. With regard to the statement by the representative of Singapore, he wished to point out that paragraph 1 dealt only with the completion by the banking system of the credit transfer. Paragraph 2 concerned the discharge of obligation.

75. In response to the point raised by the representative of Singapore, Mr. CRAWFORD (Canada) said that, according to the Secretariat's comments (A/CN.9/346, p. 90), the credit transfer was completed when the beneficiary's bank accepted the payment order. The concept of completion meant that the payment order had reached the proper place at the proper time, but not necessarily in the proper amount.

76. In order to make it clear that the payment order had reached the right place and was also in the proper amount, a phrase such as that appearing in article 7(2) "consistent with the contents of the payment order" might, perhaps, be included in the paragraph under consideration. It might also be possible to delete the second sentence of article 17(1), which had nothing to do with the issue of time.

77. Mr. ABASCAL ZAMORA (Mexico) said that the purpose of article 17 was to establish the moment at which the credit transfer was completed and the transfer process ended. There was no reason for confusion with regard to the discharge of obligation. Paragraph 2 made express reference to those cases where the credit transfer was for the purpose of discharging an obligation of the originator to the beneficiary that could be discharged by a credit transfer to the account indicated by the originator.

78. The applicable law determined the moment of payment, which was when the beneficiary's bank accepted the payment order. He therefore saw no need to introduce any substantive changes into the article, and thought that any difficulties could be dealt with by the Drafting Group.

79. Mr. AL-NASSER (Observer for Saudi Arabia) said he thought that the point raised by the representative of Singapore could be met by replacing the second sentence of paragraph 1 by the following text: "When the transfer has been completed to the beneficiary's bank, the latter is indebted to the beneficiary to the extent of the value of the payment accepted."

80. Mr. GREGORY (United Kingdom) said he was not certain that the Saudi Arabian suggestion did not introduce an entirely new concept into the article.

81. He had some misgivings about amending article 17, as suggested by the Finnish observer, because he was not sure how the change related to the concept of acceptance by the beneficiary's bank. In that connection, he said that the beneficiary's bank was obligated, under article 9(1), once a payment order received had been accepted, to place the funds at the disposal of the beneficiary while, under article 17(1), it became indebted to the beneficiary. Both those cases must, of course, refer to the right beneficiary, the one specified in the payment order.

82. Upon acceptance by the beneficiary's bank, as the Law currently stood, the beneficiary's bank then owed the money to the correct beneficiary and the ways in which the bank could accept the payment order were set out in articles 8(1)(b) and 8(1)(c). Neither of those provisions had anything to do with crediting an account or actually handling the money, elements that would have to follow acceptance.

83. If, after acceptance, the bank then credited the wrong beneficiary, the real beneficiary was entitled to the money under the law governing the relationship between the beneficiary and his bank. If the Commission said that the transfer was not complete until the bank had actually credited the right beneficiary, that would give rise to difficulties with regard to other provisions of the Model Law, where reliance was placed on the concept of the transfer ending upon acceptance.

84. All in all, he thought that the Commission would have to be very careful if it decided to proceed along the lines suggested by the observer for Finland.

85. Mr. FELSENFELD (United States of America) said he thought that, as it was currently drafted, the Model Law was unworkable. It should be amended along the lines of the Nigerian and Finnish suggestions.

86. In the case of article 17, the provision would be greatly improved if it was decided to include wording to the effect that the beneficiary must be the beneficiary originally designated, and that the transfer was to the extent of the payment received.

87. With respect to the point raised by the representative of Singapore concerning the difficulties connected with the word "completion", he thought that, when paragraph 1 of article 17 was read in conjunction with paragraph 2, it became clear that it referred to the duties of the banking system and that discharge referred to quite another matter. However, it might be possible to meet the concern expressed by amending paragraph 1 to read: "A credit transfer is completed when the funds are placed at the disposal of the beneficiary."

The meeting rose at 5.15 p.m.